

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

United States of America,

Case No.: 2:18-cr-00069-JAD-NJK-2

Plaintiff

v.

**Order Denying Emergency Motion for  
Compassionate Release and Granting  
Motion to Seal Medical Records**

Steven G. McPeak,

Defendant

[ECF Nos. 70, 75]

Defendant Steven Guy McPeak is nearly halfway into his five-year sentence for conspiracy to distribute methamphetamine. He asks this court to grant him compassionate release or a reduction of his sentence because he is almost 75 years old, suffers from Hepatitis B and hyperinflated lungs, and was recently discovered to have blood in his stool—all of which he argues puts him at a higher risk for contracting SARS-CoV-2, the virus that causes COVID-19.<sup>1</sup> I deny the motion because McPeak hasn't shown that such relief is warranted.

**Background**

In June 2019, McPeak pleaded guilty to conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(c).<sup>2</sup> In his plea agreement, McPeak admitted that he provided his co-defendant with approximately two ounces of methamphetamine to complete a six-ounce sale to an undercover officer.<sup>3</sup> After his co-defendant completed the 173.9-gram sale and was taken into custody, the officers found McPeak in his van nearby.<sup>4</sup> The officers arrested

<sup>1</sup> ECF Nos. 70 (motion), 76 (reply), 78 (second supplement).

<sup>2</sup> ECF No. 35 at 2 (plea agreement).

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.*

1 McPeak, searched the van, and found an additional 16 grams of methamphetamine and suspected  
2 MDMA pills.<sup>5</sup> McPeak admitted to giving his co-defendant the extra methamphetamine for the  
3 sale after he was read his *Miranda* rights.<sup>6</sup> He was sentenced to five years in custody followed  
4 by three years of supervision for the offense<sup>7</sup> and is currently serving his sentence at the Herlong  
5 Federal Correctional Institute (FCI). The Bureau of Prisons' (BOP) website reflects June 6,  
6 2022, as his release date.<sup>8</sup>

7 In a counseled motion and two supplemental filings, 74-year-old McPeak asks the court  
8 to grant him a compassionate release or a modification in his sentence.<sup>9</sup> He claims that he isn't  
9 safe at Herlong FCI because the inmates are subject to 23-hour lockdowns and that he needs a  
10 walker to ambulate after having fallen down some stairs. He adds that his age and diagnoses of  
11 Hepatitis B, hyperinflated lungs, and blood in his stool are compelling circumstances that  
12 warrant his release because they put him at a higher risk of contracting SARS-CoV-2.<sup>10</sup> McPeak  
13 argues that he poses minimal risk to the community because he is unlikely to be a violent  
14 offender at his age and he believes that the factors listed under 18 U.S.C. § 3553(a) support his  
15 release.<sup>11</sup> He asks to be temporarily released to the home of a family friend who lives in  
16 downtown Las Vegas while he obtains a permanent residence and can collect his pension

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19 <sup>5</sup> *Id.*

20 <sup>6</sup> *Id.*

21 <sup>7</sup> ECF Nos. 67, 68.

22 <sup>8</sup> *Find an Inmate*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/inmateloc/> (last visited August 6, 2020).

23 <sup>9</sup> ECF No. 70.

<sup>10</sup> See reply and second supplement to the motion at ECF Nos. 76, 78.

<sup>11</sup> ECF No. 70.

benefits as a retired ironworker.<sup>12</sup> The government opposes his motion, arguing that McPeak has neither administratively exhausted his request<sup>13</sup> nor identified extraordinary and compelling reasons warranting release; he was arrested at 72 with a rich history of substance dependency and drug crimes, and therefore remains a danger to the community.<sup>14</sup>

### Discussion

A sentencing court's ability to modify or reduce a sentence once imposed is seriously limited.<sup>15</sup> The compassionate-release provision of 18 U.S.C. § 3582(c)(1)(A)(i), as amended by the First Step Act of 2018,<sup>16</sup> is an exception to this limitation. It allows the sentencing judge to reduce a sentence based on "extraordinary and compelling reasons" after the defendant has failed to get the BOP to bring such a motion on his behalf.<sup>17</sup> The court must consider the factors in 18 U.S.C. § 3553(a) "to the extent that they are applicable," and any sentence reduction must be "consistent with applicable policy statements issued by the Sentencing Commission."<sup>18</sup> The court may entertain an inmate's request for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) only (1) "after [he] has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion" on his behalf or (2) after "the lapse of 30 days

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<sup>12</sup> *Id.* at 15–16; ECF No. 77 at 1–2.

<sup>13</sup> ECF No. 73 at 6.

<sup>14</sup> *Id.* at 18.

<sup>15</sup> *See United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003) (exploring Federal Rules of Criminal Procedure 35 and 36); 18 U.S.C. § 3582(c).

<sup>16</sup> The First Step Act of 2018, § 603(b), Pub. L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018).

<sup>17</sup> 18 U.S.C. § 3582(c)(1)(A)(i).

<sup>18</sup> *Id.*

1 from the receipt of such a request by the warden of the defendant's facility, whichever is  
2 earlier.”<sup>19</sup>

3 **A. Exhaustion of the BOP's compassionate-release request process**

4 The parties dispute whether McPeak exhausted the administrative process before filing  
5 this motion for compassionate release.<sup>20</sup> In his first supplemental filing, McPeak attached the  
6 warden's denial of his May 13, 2020, request.<sup>21</sup> But that denial was based on a different reason  
7 for relief—only his age—than the ones McPeak asserts here. Explaining that “[McPeak is] a 74-  
8 year-old male with no underlying medical conditions that would indicate an increased risk[,]” the  
9 warden determined that McPeak “d[oes] not meet the criteria for [c]ompassionate [r]elease.”<sup>22</sup>  
10 Because the warden didn't consider McPeak's diagnoses for Hepatitis B, hyperinflated lungs,  
11 and blood-in-the-stool diagnoses in denying his request, it's not clear that McPeak exhausted the  
12 administrative process for the request he now makes.

13 **B. Extraordinary and compelling reasons for a sentence reduction**

14 But assuming without deciding that McPeak did exhaust the administrative process, I  
15 deny his compassionate-release request on its merits because he has not shown that a sentence  
16 reduction is warranted. The COVID-19 pandemic is undeniably grave and its impacts on every  
17 aspect of American life are unprecedented. But the BOP has implemented a detailed COVID-19  
18 response plan for federal inmates, and the low number of reported cases at Herlong FCI suggests

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19 <sup>19</sup> *Id.*

20 <sup>20</sup> Compare ECF No. 70 at 7 (providing that Herlong FCI's warden denied his request on June  
21 10, 2020—over one month before McPeak filed this motion), with ECF No. 73 (arguing that  
22 McPeak did not “provide any information or documentation substantiating that he actually  
submitted the request, or that the request stated the same grounds for compassionate release”  
asserted in the motion).

23 <sup>21</sup> ECF No. 77-1.

<sup>22</sup> *Id.*

1 that the plan is effective there.<sup>23</sup> The BOP's website reflects that just two inmates and zero staff  
 2 members at Herlong FCI are currently COVID-19 positive.<sup>24</sup>

3 Individuals like McPeak who are in their "70s are, in general, at [a] higher risk for severe  
 4 illness"<sup>25</sup> from the virus, and the risk for contracting it increases if the individual has underlying  
 5 medical conditions like obesity, cancer, and chronic obstructive pulmonary disease (COPD).<sup>26</sup>  
 6 Though respiratory issues like hyperinflated lungs may be a symptom of COPD, McPeak doesn't  
 7 argue that he has a COPD diagnosis. Indeed, his diagnosis is for "[r]espiratory disorder,  
 8 unspecified."<sup>27</sup> He also doesn't argue that his fecal-blood diagnosis falls under the Centers for  
 9 Disease Control and Prevention's (CDC) definite-risk categories, and his Hepatitis B diagnosis  
 10 also falls outside that list.<sup>28</sup> The CDC only recognizes conditions that a person currently has, not  
 11 conditions that a person is at risk of developing, as increasing the risk of severe illness from  
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 14 <sup>23</sup> *BOP Implementing Modified Operations*, FEDERAL BUREAU OF PRISONS, [https://www.bop.gov/coronavirus/covid19\\_status.jsp](https://www.bop.gov/coronavirus/covid19_status.jsp) (last visited Aug. 17, 2020).

15 <sup>24</sup> *See COVID-19: Coronavirus*, FEDERAL BUREAU OF PRISONS,  
 16 <https://www.bop.gov/coronavirus/> (last visited Aug. 19, 2020).

17 <sup>25</sup> The Centers for Disease Control and Prevention website reports that in the United States  
 18 approximately 80% of COVID-19 related deaths have been among adults aged 65 years or older.  
 19 *See Older Adults and COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION,  
 20 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited  
 21 Aug. 17, 2020).

22 <sup>26</sup> *People with Certain Medical Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION,  
 23 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited Aug. 17, 2020) (listing underlying conditions that put "[p]eople of  
 any age...**at increased risk** of severe illness from COVID-19" and listing cancer, chronic kidney  
 disease, COPD, immunocompromised state, obesity, serious heart conditions, sickle cell disease,  
 and Type 2 diabetes mellitus as definite risk diagnoses) (emphasis in the original).

24 <sup>27</sup> ECF No. 79 (sealed medical records).

25 <sup>28</sup> *See People with Certain Medical Conditions*, *supra* (providing that individuals with liver  
 disease "**might be at an increased risk** for severe illness from COVID-19") (emphasis in the  
 original).

1 COVID-19.<sup>29</sup> So while a later diagnosis confirming cancer, COPD, or another qualifying  
2 disease might establish McPeak's high-risk classification, the concerns McPeak has identified  
3 fall short of the extraordinary and compelling concerns needed to justify compassionate release.

4 **C. Consideration of the applicable § 3553(a) factors**

5 Even if McPeak's conditions during this pandemic qualified as extraordinary and  
6 compelling reasons to essentially cut his sentence in half, I would still deny his motion because  
7 the applicable § 3553(a) factors do not justify a sentence reduction for him. McPeak has a  
8 lengthy criminal history (a score of 10 and category of V), and most of his offenses involve  
9 drugs. For this offense, McPeak drove to the drug sale, personally possessed methamphetamine,  
10 and carried a large amount of cash that he admitted was drug money. I am not persuaded that he  
11 presents a low risk to the community because of his age. He was 72 when he was charged in this  
12 case, and neither his age nor his significant past incarcerations have yet deterred his criminal  
13 behavior.

14 And while I do not overlook the positive information for McPeak on the other end of the  
15 § 3553(a) scale—which includes him being a retired ironworker with a pension and the fact that  
16 he has secured temporary housing—these facts do not outweigh the factors that justified a five-  
17 year sentence just ten months ago. During sentencing, I carefully evaluated the § 3553(a) factors  
18 to reach a sentence that I found was sufficient but not greater than necessary to accomplish the  
19 goals and objectives of sentencing. I considered that much of McPeak's criminal history was  
20 related to his struggle with addiction and that he hadn't had an opportunity for treatment. I also  
21 took into account his lesser role in the drug sale compared to his codefendant. I concluded that  
22 these factors justified a ten-month downward variance from the sentencing guidelines. I also  
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<sup>29</sup> See *id.* (comparing definite-risk and potential-risk categories).



1 IT IS FURTHER ORDERED that the Government's unopposed motion to file McPeak's  
2 medical records under seal [ECF No. 75] is **GRANTED**. The Clerk of Court is directed to  
3 maintain the seal on ECF No. 74.

4 Dated: August 19, 2020

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7 U.S. District Judge Jennifer A. Dorsey  
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